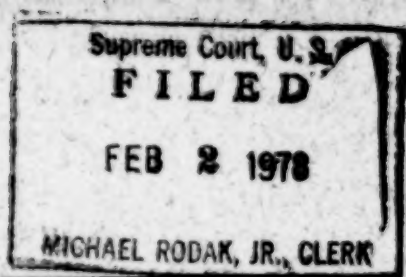


No. 77-813



In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSE JESUS URIAS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1977. A petition for rehearing was denied on November 8, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on December 7, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion when, on the day following the close of evidence, it denied petitioner's motion to reopen his case.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 12 years' imprisonment, to be followed by three years' special parole. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that on August 30, 1976, petitioner agreed in the presence of informant Angel Zavala to sell 30 ounces of heroin to undercover Drug Enforcement Administration Agent Gilbert Bruce for \$36,000 (Tr. 62-65). The parties agreed that the exchange would take place in a Phoenix motel (Tr. 66). Petitioner arrived at the motel with a small bag containing heroin. After examining the heroin, Bruce gave a prearranged arrest signal; other agents then entered the room and arrested petitioner (Tr. 70, 71-74).

Petitioner admitted all of the essential elements of the offense (Tr. 249, 254-261), but asserted that his friend Victor Bizzcara had coerced him to obtain and deliver heroin and that Bizzcara had been compelled to do so by threats from Zavala, who in turn had allegedly been acting under pressure from Agent Bruce (Tr. 240-241, 245-248).¹

Zavala denied having threatened Bizzcara or anyone else (Tr. 187, 216-218). Petitioner called Bizzcara to corroborate his testimony concerning Zavala's threats, but Bizzcara declined to testify, invoking his Fifth Amendment privilege against self-incrimination (Tr. 242-243).

¹Petitioner contended that this amounted to entrapment, but the defense might more properly be called duress in light of the allegations of threats of harm; unlike the entrapment defense, the duress defense does not turn on evidence of the defendant's pre-disposition to commit similar crimes.

Petitioner and the prosecution rested their cases, and the district court recessed proceedings until the next afternoon, when argument and instructions to the jury were scheduled. Just prior to summation, defense counsel moved to reopen his case; counsel stated that Bizzcara had decided to testify and would corroborate petitioner's testimony concerning Zavala's threats (Tr. 269-271).² Although the district court initially was disposed to grant the motion, it ultimately refused to reopen the case when it learned that Zavala, who alone could rebut Bizzcara's testimony, had left town after both sides had rested their cases the previous day and was unavailable as a witness (Tr. 271).

ARGUMENT

Petitioner contends that the district court should have allowed him to reopen the case to present Bizzcara's testimony concerning Zavala's alleged threats. Petitioner concedes, as he must, that a motion to reopen a case after a party rests is addressed to the sound discretion of the district court. *United States v. Bridgefourth*, 538 F. 2d 1251, 1253 (C.A. 6); *United States v. Webb*, 533 F. 2d 391, 395 (C.A. 8); *United States v. Sisack*, 527 F. 2d 917, 919-920 (C.A. 9); *United States v. Levin*, 443 F. 2d 1101, 1107-1108 (C.A. 8), certiorari denied, 404 U.S. 944; *Rhyne v. United States*, 407 F. 2d 657, 661 (C.A. 7). The court must consider, among other things, the opposing

²Defense counsel summarized Bizzcara's testimony as follows (Tr. 271):

Judge, he is going to testify to exactly the same pre-arrest things that the defendant testified to, that Angel [Zavala] mentioned the Mafia, that if he didn't cooperate, that "Pelon" would grab a kid, that he would do anything, but that he forced people to cooperate with him.

party's opportunity to meet the new evidence and the probability that the evidence, presented after the party has rested, will have a disproportionate effect on the jury's deliberations. *United States v. Webb, supra; Rhyne v. United States, supra.*

Here, both factors support the court's denial of the motion. The prosecutor had no opportunity to rebut the proffered testimony of Zavala's alleged threats, because Zavala had become unavailable following the close of evidence on the previous day. Moreover, the new evidence, presented a full day after the close of all the evidence, might well have had a disproportionate impact on the jury's deliberations. In these circumstances, the trial court did not abuse its discretion in denying petitioner's motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.